



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 75 OF 2015

THE REPUBLIC.....PROSECUTOR

- VRS -

1. FREDRICK OMONYWA ONYANGO.....1ST ACCUSED

2. ALFRED OMARIBA ONDIEKI.....2ND ACCUSED

JUDGEMENT

The accused persons are charged with murder contrary to Section 203 as read with 204 of the Penal Code.

The particulars of the offence are that on 14th April 2014 at Upper Manga village within Borabu Sub-county within Nyamira County jointly with others not before court the accused persons murdered Saulo Musembi Ondieki.

The accused persons pleaded not guilty to the charge. The prosecution called twelve witnesses the key witness being KO (Pw1) who testified that at the material time he was fourteen years old and was employed by the deceased as a herdsman; that on the material day at about 6.45pm he had just driven the cattle home when he met two people who he had never seen. They asked him where mzee (meaning the deceased) was and so he took them into the house and left them with him. He stated that the deceased was alone. He testified that as he walked towards the gate he met two other people one of who he did not know but the second being Omonywa the 1st accused in this case. He stated that Omonywa was a cousin of the deceased and he had known him for the period of one year he had worked for the deceased, as they were neighbours. He also stated that he saw the 1st accused clearly as darkness had not set in. He stated that the man who was with the 1st accused pushed him back to the house and shoved him to a chair. The man then stood guard at the door and it was then that one of the other two men who he had taken to the house earlier stabbed the deceased on the head with something that looked like a pen knife and the deceased seemed to get confused. Then he (Pw1) was shoved under the chair and at that juncture one of the men who had gone to the house first and the one who was in the company of the 1st accused went and strangled the deceased. He clarified that the 1st accused was not one of those who strangled the deceased but stated that the 1st accused took an axe from the corner of the room which he used to strike the deceased at the back of the head and when one of the assailants remarked that the deceased had not died he struck him again. After that one of the assailants took the deceased's mobile phone and some money which was on the table and they left, the 1st accused leading the way. The deceased was left in a pool of blood. It was then that he (Pw1) raised the alarm and a neighbour notified the police who went to the scene. The family of the deceased (son (Pw2) and wife (Pw3)) also went to the scene. Pw1 testified that when all this was happening there was a battery powered light in the room. He stated that he did not have a grudge against any of the people he claims to have seen that evening and that his first time to see the 2nd accused was in this court. He also stated that when the police officers came they removed the deceased's body from the mortuary and that they returned to the house the next day to record his statement.

Alexander Mogeni Mosei (Pw2) and Monica Nyanduko Mosebi (Pw3) are a son and wife of the deceased respectively. They confirmed that they were not at home at the material time but went home after getting information concerning the incident. They confirmed they found the deceased in a pool of blood and that he had injuries on the head. They also stated that there was a land dispute between the deceased and the 1st Chief Inspector Kamau (Pw5), the then officer in-charge of crime at Manga Police Station testified that on 14th April 2014 at 1930hrs (7.30pm) he received a call concerning a robbery at Ekerubo village from a member of the public and immediately mobilized a team of officers who immediately accompanied him to the scene. He stated that upon arrival at the home they found a group of people who were conversing in low tones. They were introduced to Pw1 and he took them to a house where a paraffin lamp was burning although the light was very dim. He stated that there was a strong chemical smell in the room and that there were grains strewn on the floor which signified there was a scuffle. He stated that they found the deceased facing the wall in a kneeling position. He testified that he interrogated Pw1 whose age he estimated to be fifteen years and Pw1 showed them an axe which had blood and told them it is what one of the assailants had used to hack the deceased. Pw5 stated that Pw1 also informed them that the attackers did not wear a disguise. He further stated that when he turned the deceased's body he noticed he had an injury on the forehead that seemed to have been inflicted by a blunt object. He stated that after conducting the preliminaries they removed the body and took it to Nyansiongo Hospital Mortuary. He alleged to have been told by Pw1 that he did not identify any of the attackers. He also stated that Pw1's statement was recorded on the same day by an officer called

Samson Ole Toma who by the time of this trial had retired from the service. He was emphatic that while they were at the scene the name of the 1st accused did not feature as one of the assailants.

Daniel Mokua (Pw6) was a son of the deceased who identified the body to the doctor who performed the post mortem. Like Pw2 and Pw3 he was not at home on the material day but he alleged to have heard the 1st accused threaten the deceased on several occasions. Like Pw2 and Pw3 he

The police also called Thomas Nyabuti Bosire (Pw8) who testified he was the deceased's neighbour. He claimed to have met the deceased at about 10am on that very day but that at about 7pm O (Pw1) went to his house running and requested him to go to the deceased's house as he was under attack. He stated that he rushed to the deceased's house and found a sister of the deceased wailing. Since the house was dark he declined to go inside but soon another neighbour arrived with a torch and they went inside and found the deceased kneeling holding onto a couch. He stated that there was blood and a strong smell of a chemical that had poured on the floor. He however did not see the assailants.

The investigating officer, Constable Malimali (Pw11), testified that he took over this case on 14th May 2015 and in the course of his investigations he tracked the phone that had been stolen from the deceased to Lydia Mokaya who was staying in Kiambu. He went there and arrested her and upon interrogating her she disclosed the phone had been given to her by Omariba, the 2nd accused, who went into hiding when he learnt he was being sought. He nevertheless managed to arrest him. He stated that service provider's data showed the deceased had last used the phone on 17th April 2014 and that when he interrogated the 2nd accused he admitted he had given the phone to Lydia in exchange for his. He therefore decided to charge him with this offence.

Lydia Mokaya (Pw4) testified that she gave her phone to the 2nd accused, who is her cousin and who she referred to as Soko, in exchange for the phone which later turned out to belong to the deceased. She claimed the exchange took place in December 2014 when she was visiting her aunt in a place called Itumbe. The phone remained in her possession for 3 months before the police caught up with her and repossessed it. She stated that by then she had left for Nairobi to work as a house help and that is where she was arrested. In his evidence, Pw1 identified the phone found in Pw4's possession as the one taken from the deceased's house on the day he was killed. The phone was also identified by Pw2 (the deceased's son).

This court heard that the deceased died as a result of severe head injury. Dr. Felix (Pw7) testified that he conducted a post mortem on the body of the deceased on 17th April 2014 at St. Joseph Nyansiongo Health Centre. He stated that the body had two cut wounds on the scalp one on the left parietal area measuring 4cm x 2cm and the other on the occipital area. He stated that there was a skull fracture and a blunt abdominal injury on the left lumbar region. All the other systems were normal.

Apart from the black Nokia phone recovered from Lydia Moraa (Pw4), the investigating officer also produced an ITEL black phone allegedly recovered from the 2nd accused and which Pw4 alleged to have given him in exchange for the Nokia belonging to the deceased; a receipt from Keromatt Ltd and an axe (Exhibit 1 (a) (b) (c) and 2). The post mortem report was produced as exhibit 3.

The prosecution called two other witnesses Levis Nyandika (Pw9) and Kennedy Nyakundi Apiri (Pw10) who however stated that they had no knowledge of how or by whom the deceased died.

The accused persons both elected to give evidence on oath. The 1st accused stated that he was a businessman cum farmer; that on 14th April 2014 at 6.30pm he was in Nairobi. He stated that he knew Saulo Musembi Oriko but not Saulo Musembi Ondieki and that the Saulo he knew was his uncle (brother to his father). He stated that he did not see Saulo on the material day as he was in Nairobi and termed Pw1's evidence as mere lies. He produced 2 bus tickets dated 10th April and 14th April 2014 respectively as proof that he departed Nairobi at 9.30pm on that day having gone there on 10th April 2014. He stated that he was arrested only on 25th November 2015 yet he had been at home all along save that he would travel to and from Nairobi. He contended that he never received any summons to record a statement over this case. He stated that between 25th November 2015 when he was arrested and 8th December 2015 when he was arraigned he was kept at the police station without any explanation. He claimed to have arrived at Kijauri at 4am on the morning of 15th April 2014 and on receiving information that his uncle had died he straight away went to the scene. He stated that he also attended the burial and participated in showing mourners where to park. He disputed that there was information implicating him and also denied that he hacked the deceased with an axe. He contended that although an axe was produced there was no evidence that he held it.

The 2nd accused stated that he is a musician and that he hails from Kisii. He denied killing the deceased and stated that on 14th April 2015 he was at his home in Riseni Bobasi Sub-county and never knew the deceased. He stated that he was arrested in Kisii on 27th September 2015 but the person who arrested him was not a witness in this case. He denied he knew Pw4 or that he exchanged a phone with her. He also denied that he was found in possession of the ITEL phone and vehemently denied he is Soko. He also claimed to have been detained at Keroka Police Station for a number of days. He contended that he does not even know the place the deceased hailed from and that nobody alleges to have seen him at the scene.

Mr. Ondari, Learned Counsel for the accused, summed up by stating that the prosecution totally failed to prove its case; that the evidence was full of contradictions and cannot support a conviction. He stated that there was inconsistency between Pw1's statement to the police and his testimony and that none of the other witnesses implicated the accused persons. He submitted that Pw11 stated he was not given any name of a suspect and that was the reason it took him one year to arrest the accused persons.

In regard to the 2nd accused, Mr. Ondari submitted that no evidence was adduced to prove he had used the phone stolen from the deceased. He invited this court to draw an adverse inference from the omission. He further submitted that the alibi of the 1st accused was not discharged. In support of his submissions, Mr. Ondari relied on the following cases: -

2. Roba Galma Wario v Republic [2015] eKLR.

3. Republic v Lawrence Mukeria & Another [2014] eKLR.

On his part, Mr. Majale submitted that the evidence was cogent and consistent and that there was no contradiction. He submitted that Pw1 identified the assailants at the point of entry into the house. Also that Pw1 knew the 1st accused very well having worked there for a year. He submitted that Pw1 testified that he saw the 1st accused hack the deceased repeatedly and no contradiction is elicited from that testimony. Mr. Majale, stated that it is not Pw5 but Pw11 who was the investigating officer and submitted that Pw11 testified how he tracked and recovered the deceased's phone from Lydia Mokaya (Pw4) and was then led by Lydia to the 2nd accused. Mr. Majale contended that there was evidence from Pw1 that the assailants left with a phone belonging to the deceased. He submitted that the alibi raised by the 1st accused did not rebut the prosecution's case. He also submitted that a longstanding land dispute between the 1st accused and the deceased was proved by Pw3 who stated that it had led to the 1st accused threatening the deceased who was the administrator of the estate. Mr. Majale urged this court to find the accused persons guilty and convict them.

As it is not disputed that the deceased died, the 1st accused having stated that he even participated in his burial and there being no doubt that his death was by a human hand and by an unlawful act, the only issues that call for determination are: -

i. Whether the unlawful act was by the accused persons and;

ii. Whether the unlawful act was with malice aforethought.

The 1st accused is implicated in this offence by direct evidence and the 2nd accused by circumstantial evidence. For the 1st accused the evidence is that of a single witness who at the time was fourteen (14) or fifteen (15) years old and which must be treated with a lot of caution. In the case of **Maitanyi v Republic [1986] KLR 198** the Court of Appeal held: -

“1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”

Guided by the above principles, I have treated and approached the evidence of KO (Pw1) as respects the 1st accused with a lot of caution and warned myself of the danger of relying on the evidence of a single witness. However, I am satisfied beyond reasonable doubt that Pw1 positively identified the 1st accused person. It was his evidence that the 1st accused was in the second set of men that he met at the gate as he was leaving having taken the first two to the house where the deceased was. Although it was in the evening it was not yet dark and so he could see clearly. He did not leave but was pushed back to the house and shoved first onto a chair and moments later under a sofa. It was his evidence that it was while he lay under the seat that he saw the assailants strangle the deceased before the 1st accused hit him on the head with an axe and when one of the other assailants remarked that he had not died he hit him a second time. Pw1 stated that inside the house there was light from a lamp although it was dim (not very bright). Chief Inspector Kamau (Pw5) confirmed this when he stated **“There was a paraffin lamp which was lit but it was very dim.”** This therefore corroborated the evidence of Pw5 that there was light in the room that was the scene of crime. It confirms the truthfulness of the testimony of the Pw1. It was also Pw1's testimony that he knew the 1st accused person well because he (Pw1) had worked for the deceased close to one year and the 1st accused apart from being the deceased's cousin was a neighbour, facts which were admitted by the 1st accused when he stated in cross examination: -

“The deceased was my uncle. Our homes are about 500 metres apart.”

That Pw1 worked for the deceased was corroborated by the deceased's son (Pw2), wife (Pw3) and a neighbour, Thomas Nyabuti Bosire (Pw8), who also confirmed that it was to him that (Pw1) first reported that the deceased was under attack and pleaded with him to go help him. I find it a fact therefore that Pw1 knew the 1st accused well and that there was sufficient light first outside and later inside the house for him to positively recognize him. The prevailing conditions favoured a correct identification and I see no good reason not to accept the evidence of Pw1. The 1st accused mounted an alibi and produced bus tickets to support it. While I appreciate that it is never the duty of the accused to prove his alibi but the duty of the prosecution to disprove it, I find that in the face of the very cogent and credible evidence of Pw1, that alibi cannot stand. I accordingly reject the same and find that the 1st accused was among the four assailants under whose hands the deceased suffered death and that it was he who as a matter of fact inflicted the fatal blow when he hit the deceased on the head with an axe. The post mortem report confirms two injuries on the head of the deceased and a fracture of the skull and these are injuries which are consistent to a blow on the head with an axe. Chief Inspector Kamau (Pw5) confirmed that he saw an axe with blood in the room and that he was told by Pw1 that it was the one that was used to hack the deceased. This again confirms the truthfulness and trustworthiness of Pw1's evidence. True the axe was not subjected to a forensic examination to establish a link between it and the 1st accused but I am satisfied that he was seen hacking the deceased with it by Pw1. Pw1 also explained that the reason he did not disclose having recognized the 1st accused was because he was not asked by the police. Chief Inspector Kamau (Pw5) stated that the 1st accused was never implicated by anybody that night. Pw5

alleged that he made inquiry and received a negative answer. I did not however believe him as Pw1 passionately denied that he was asked if he had identified any of the assailants. It is noteworthy that it was not Pw5 but another officer who recorded the statement of Pw1. Pw1 was only 14 or 15 years (15 in Pw5's estimation) and it would not be too far-fetched to say that he may not have realized the gravity of such information unless the question was put to him. There is after all nothing in the evidence to suggest that Pw1 had any reason to lie against the 1st accused. I believe him. The fact therefore that no information of the 1st accused's involvement in the crime came forth on the night police visited the scene does not absolve him from culpability. Neither is the fact that he was not arrested immediately but a year later. This court heard that there was a long standing land dispute between the 1st accused and the deceased and he had on several occasions threatened the deceased. Whereas motive is not a necessary ingredient of this offence I find that this goes further to corroborate that the 1st accused indeed took part in the commission of this crime.

In regard to the 2nd accused, evidence is that he was charged because a phone stolen from the deceased's house on the day he was killed was traced to him. Pw11 stated that the phone was initially tracked to Lydia Mokaya who he was able to trace and find in Kiambu County. Lydia Mokaya testified in this case as Pw4. She narrated how she exchanged her ITEL phone which was single sim with this Nokia phone which was a double sim. She identified the person she exchanged phones with as her cousin Alfred Soko the 2nd accused in this case. Although the 2nd accused denied this and the fact that the two of them were related it is significant that when he was arrested by Pw11 he was found in possession of an ITEL phone which when put to Pw4 she identified as hers. If it is his case that Pw4 had reason to lie against him although he did not expressly state so, what about Pw11, a police officer who did not know him at all prior to this case? My finding is that the officer (Pw11) could not have lied about the ITEL phone as he had no reason to do so. His (2nd accused's) possession of the ITEL phone belonging to Pw4 corroborates her evidence of an exchange. A receipt for the ITEL phone was exhibited though not produced and it confirmed the phone belonged to Pw4. The Nokia phone found in Pw4's possession was identified by Pw1, Pw2 and Pw3 as the one taken from the deceased's house. These witnesses knew the phone very well as they were accustomed to seeing the deceased using it. I am satisfied therefore that they positively identified it. The 2nd accused did not give any explanation let alone a plausible one as to how the phone came into his possession instead choosing to completely deny it. While I cannot impute a guilty knowledge from his denial, I can do so from the period of time that he obtained the phone. According to Pw4 the exchange took place in December 2014. The deceased was killed in April 2014 hence a period of six months. The 2nd accused gave no explanation of when he came by this phone so we can safely assume he had it for six months and in my view six months is not too long a period to rule out the doctrine of recent possession. As I have stated he did not offer any explanation in rebuttal and I am therefore entitled to draw the inference that he either stole the phone or that he was a guilty receiver. In this case he obviously could not have physically stolen it since Pw1 who was an eye witness was emphatic that he did not see him in the house on that day but I can draw an inference that he must have acted in concert with the assailants although he was not present with them. The fact that six months later he chose to exchange the phone with an innocent Lydia Mokaya (Pw4) who he was sure had no knowledge at all of how it had been obtained is proof that he had a guilty mind. Accordingly, I find that he was properly joined to this charge together with the 1st accused.

What about malice aforethought? **Section 206 of the Penal Code** sets out the circumstances from which malice aforethought can be established. The Section states: -

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

In the case of **Republic v Tubere S/o Ochen [1945] 12 EACA 63** which has been cited with approval by our courts in a long line of cases including in **Carilus Omondi Mboga & Another v Republic [2019] eKLR**, the court held that:-

“the weapon used, the manner in which it was used, the part of the body targeted, the nature of the injuries inflicted either a single stab/wound or multiple injuries are elements from which malice aforethought may be inferred.”

In this case there is post mortem evidence that the deceased died as a result of severe head injury and that he had 2 cut wounds on the head and his skull was fractured. This as I held earlier is consistent with the eye witness account that he was hit on the head with an axe by the 1st accused and when one of the assailants said he was still alive he was hit again. Clearly there was an intention to kill him otherwise there would have been no sense in saying he was not yet dead and for the 1st accused to inflict a second blow which proved fatal. Malice aforethought was proved beyond reasonable doubt. I perused the authorities cited by Learned Counsel but none comes to their aid. In the premises I find that not only did the accused persons kill the deceased but that they did it of malice aforethought. I find them guilty of Murder contrary to Section 203 as read with Section 204 of the Penal Code and convict them accordingly.

Signed, dated and delivered in Nyamira this 23rd day of April 2020.

E. N. MAINA

JUDGE